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UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF CALIFORNIA

In re

JESUS GUTIERREZ GALINDO AND ALICIA  
GALINDO,

Debtors.

JESUS GUTIERREZ GALINDO AND ALICIA  
GALINDO,

Plaintiffs,

vs.

MORTGAGEIT, INC., WASHINGTON  
MUTUAL BANK, J.P. MORGAN CHASE  
BANK, MORTGAGE ELECTRONIC  
REGISTRATION SYSTEMS, INC., HILLTOP  
FINANCIAL MORTGAGE, INC., GLORIA  
GARDNER AND THANH NGUYEN,

Defendants.

Case No.: 08-53439 RLE

Adversary No.10-05112

Chapter 13

**DEFENDANT MORTGAGEIT, INC.'S  
MEMORANDUM OF POINTS AND  
AUTHORITIES IN SUPPORT OF  
MOTION TO DISMISS COMPLAINT IN  
ADVERSARY PROCEEDING**

**Date:** July 29, 2010  
**Time:** 10:30 a.m.  
**Place:** Courtroom 3099

Compl. Filed: May 11, 2010  
Trial Date: Not Yet Set

Honorable Roger L. Efremsky

Filed concurrently with:  
Notice of Motion to Dismiss  
Motion to Dismiss  
Request for Judicial Notice

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## **MEMORANDUM OF POINTS AND AUTHORITIES**

### **I. INTRODUCTION**

This adversary proceeding arises from an identical Complaint filed by plaintiffs Jesus Gutierrez Galindo and Alicia Galindo (“Plaintiffs”) in November 2009. Following MortgageIT’s motion, that previous Complaint was dismissed by this Court in March 2010. Accordingly, the present adversary Complaint is not only barred by *res judicata*, it is a frivolous lawsuit and a waste of the Court and parties’ time and resources. Plaintiffs’ Complaint should be dismissed with prejudice.

### **II. FACTUAL AND PROCEDURAL SUMMARY**

#### **A. Factual Background**

Plaintiffs Jesus Gutierrez Galindo and Alicia Galindo (“Plaintiffs”) own residential property located at 1449 Crucero Court, San Jose, California (“Property”). Compl., ¶ 19. Prior to February 2007, Gloria Gardner (“Gardner”), an employee with Hilltop Financial Mortgage Inc. (“Hilltop Financial”), approached Plaintiffs about refinancing their mortgage loan secured by the Property. Compl., ¶ 19. Plaintiffs allege that Gardner and others affiliated with Hilltop Financial made multiple misstatements to them during the course of the loan origination process. Specifically, Plaintiffs claim that Gardner told them that she could obtain a mortgage loan for them that would have lower payments than their existing loan and that the payments would include taxes and insurance. Compl., ¶ 21. Plaintiffs also allege that Gardner told them that any prepayment penalty would be “reasonable” and later that any penalty would not exceed \$10,000. Compl., ¶ 22. Finally, Plaintiffs allege that Gardner misrepresented the loan terms to them, failing to explain to them the fact that the loan had a negative amortization feature, variable interest rates and a balloon payment. Compl., ¶ 24.

On February 15, 2007, Plaintiffs refinanced their mortgage loan through a written agreement with MortgageIT, Inc. (“MortgageIT”), which was reflected in a Promissory Note in the amount of \$504,000 secured by a Deed of Trust on the Property (“Loan”). Compl., ¶ 27. In addition to the alleged misrepresentations listed above, Plaintiffs complain about other aspects of the loan origination process. Plaintiffs complain that they were forced to make a prepayment penalty in the



1 amount \$16,016.47 to American Home Mortgage in connection with their existing loan, an amount  
2 50% greater than Gardner had promised to them. Compl., ¶ 28. Plaintiffs also allege that they  
3 requested a copy of their loan documents in Spanish, but were not provided with translations.  
4 Compl., ¶ 25. And finally, Plaintiffs allege that the notary did not provide them with the required  
5 copies of a Notice of Right to Cancel at closing. Compl., ¶ 26.

6 Plaintiffs go on to allege that, at some point after originating their loan, MortgageIT  
7 transferred the loan to Washington Mutual Bank (“WAMU”). Compl., ¶ 30. WAMU then  
8 transferred the loan to J.P. Morgan Chase (“J.P. Morgan”). Compl., ¶ 30.

9 Plaintiffs allege that they gave notice through their attorneys of their election to rescind their  
10 mortgage loan transaction based upon alleged violations of the Truth in Lending Act (“TILA”) on  
11 both October 30, 2007, and January 14, 2008. Compl., ¶ 32. Thereafter, on June 30, 2008, Plaintiffs  
12 filed their Chapter 13 voluntary bankruptcy petition with this Court. Compl., ¶ 31. WAMU  
13 thereafter filed a proof of claim in the bankruptcy proceedings for the mortgage debt in the amount  
14 of \$539,080.00. Compl., ¶ 33.

15 Plaintiffs allege that on July 15, 2008, they mailed a Qualified Written Request (“QWR”) to  
16 WAMU. Compl., ¶ 35. However, Plaintiffs allege that WAMU did not respond to this request.  
17 Compl., ¶ 36.

## 18 **B. Procedural History.**

19 On or about November 23, 2009, Plaintiffs filed their first adversary Complaint against  
20 MortgageIT alleging claims for violation of the Truth in Lending Act (“TILA”), fraud, violation of  
21 California Civil Code Section 1632, determination of extent and validity of lien, and elder abuse  
22 under California Civil Code Section 3345 (“First Adversary Proceeding”). Request for Judicial  
23 Notice filed concurrently herewith (“RJN”), Exhibit A (Plaintiffs’ Complaint in First Adversary  
24 Proceeding). On February 1, 2010, MortgageIT filed a motion to dismiss Plaintiffs’ claims in the  
25 First Adversary Proceeding pursuant to Federal Rule of Civil Procedure 12(b)(6) and Federal Rule of  
26 Bankruptcy Procedure 7012(b). Plaintiffs failed to oppose MortgageIT’s motions and in March  
27 2010, Plaintiffs’ claims were dismissed. *See* RJN, Exhibit B, p. 2:11-15 (“[P]ursuant to Local Rule  
28 9013-2(a), applicable herein by Local Rule 7007-1(f), the Court exercises its discretion to determine

1 the motions without oral argument, and based on plaintiffs' failure to oppose the motion to dismiss,  
2 hereby grants the motion to dismiss as to the MortgageIT"). On March 23, 2010, the Court entered  
3 its order granting MortgageIT's motion to dismiss. *See* RJN, Exhibit C, p. 2:5 ("MortgageIT's Inc.'s  
4 Motion to Dismiss Plaintiffs' Complaint is GRANTED). Thereafter, on or about May 11, 2010,  
5 Plaintiffs filed the present adversary proceeding, alleging identical claims as to MortgageIT. *See*  
6 Document No. 1.

### 7 **III. LEGAL ARGUMENT**

#### 8 **A. Plaintiffs' Claims Were Already Dismissed By This Court.**

##### 9 **1. Plaintiffs' Claims Are Barred By The *Res Judicata* Doctrine.**

10 "The doctrine of *res judicata* provides that a final judgment on the merits bars further claims  
11 by parties or their privies based on the same cause of action...." *Headwaters Inc. v. U.S. Forest*  
12 *Service*, 399 F.3d 1047, 1051 (9th Cir. 2005) (citing *In re Schimmels*, 127 F.3d 875, 881 (9th Cir.  
13 1997)). "The elements necessary to establish *res judicata* are: "(1) an identity of claims, (2) a final  
14 judgment on the merits, and (3) privity between parties." *Headwaters*, 399 F.3d at 1052 (citing  
15 *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 322 F.3d 1064, 1077 (9th  
16 Cir.2003); *W. Radio Servs. Co. v. Glickman*, 123 F.3d 1189, 1192 (9th Cir.1997)). "[A] rule  
17 precluding parties from the contestation of matters already fully and fairly litigated 'conserves  
18 judicial resources' and 'fosters reliance on judicial action by minimizing the possibility of  
19 inconsistent decisions." *Schimmels*, 127 F.3d at 881 (quoting *Montana v. United States*, 440 U.S.  
20 147, 153-54 (1979)).

21 Pursuant to Federal Rule of Civil Procedure 41(b), "[u]nless the dismissal order states  
22 otherwise ... any dismissal not under this rule --- except one for lack of jurisdiction, improper venue,  
23 or failure to join a party under Rule 19 -- operates as an adjudication on the merits." (emphasis  
24 added); *see* Fed. R. Bankr. Proc. 7041 (providing that that Federal Rule of Civil Procedure 41  
25 applies in adversary proceedings); *e.g.*, *Ma Chuck Moon v. Dulles*, 237 F.2d 241, 242 (9th Cir. 1956)  
26 (stating that "[s]ince the Court in its order of dismissal did not specify otherwise, the judgment  
27 operated as an adjudication on the merits"). For instance, a ruling on a motion to dismiss pursuant to  
28 Federal Rule of Civil Procedure 12(b)(6) is a "judgment on the merits' to which *res judicata*

1 applies.” *Stewart v. U.S. Bancorp*, 297 F.3d 953, 957 (9th Cir. 2002) (citing *Federated Dept. Stores,*  
 2 *Inc. v. Moitie*, 452 U.S. 394, 399, note 3 (1981)). Additionally, “[a]n involuntary dismissal generally  
 3 acts as a judgment on the merits for the purposes of *res judicata*, regardless of whether the dismissal  
 4 results from procedural error or from the court's considered examination of the plaintiff's substantive  
 5 claims.” *Schimmels*, 127 F.3d at 884-85, 879 (affirming *res judicata* bar in adversary proceeding,  
 6 based on Court’s ruling previous ruling that granted motion for summary judgment “without  
 7 reaching the merits of the relators' complaint, [but granting the motion because] the relators had  
 8 failed to file a timely opposition thereto”) (citations omitted).

9 Here, the doctrine of *res judicata* bars the Plaintiffs from bringing the present claims. In  
 10 November 2009, Plaintiffs filed the First Adversary Proceeding alleging identical facts and causes of  
 11 action against MortgageIT. See RJN, Exhibit A compare Document No. 1 On February 1, 2010,  
 12 MortgageIT filed a motion to dismiss Plaintiffs’ claims in the First Adversary Proceeding pursuant  
 13 to Federal Rule of Civil Procedure 12(b)(6) and Federal Rule of Bankruptcy Procedure 7012(b). In  
 14 March 2010, after Plaintiffs failed to oppose MortgageIT’s motion, the motion was granted and  
 15 Plaintiffs’ claims were dismissed. See RJN, Exhibits B and C. Specifically, the Court ruled that  
 16 “pursuant to Local Rule 9013-2(a), applicable herein by Local Rule 7007-1(f), the Court exercises its  
 17 discretion to determine the motions without oral argument, and based on plaintiffs’ failure to oppose  
 18 the motion to dismiss, hereby grants the motion to dismiss as to the MortgageIT.” RJN, Exhibit B,  
 19 p. 2:11-15. On March 23, 2010, the Court entered its order granting MortgageIT’s motion to  
 20 dismiss. See RJN, Exhibit C, p. 2:5 (ordering that “MortgageIT’s Inc.’s Motion to Dismiss  
 21 Plaintiffs’ Complaint is GRANTED”). Accordingly, because the Court already dismissed Plaintiffs’  
 22 First Adversary Proceeding as to MortgageIT, the present adversary Complaint is barred by the  
 23 doctrine of *res judicata*.

24 **2. Plaintiffs’ Claims Should Be Dismissed Because This Is A Duplicative Adversary**  
 25 **Proceeding.**

26 Even if Plaintiffs’ Complaint is not found to be barred by *res judicata* (which it is for the  
 27 reasons explained), the instant adversary proceeding is nevertheless a duplicative action. Plaintiffs  
 28 do not file any amended Complaint, but rather burden the Court with the identical Complaint that

1 was already dismissed in the First Adversary Proceeding. Indeed, Plaintiffs' filing of this separate  
2 adversary proceeding is an apparent end-run around the Court's prior order dismissing their claims.  
3 Accordingly, this adversary proceeding is a frivolous waste of the Court and parties' time and  
4 resources, and should be dismissed with prejudice.

5 **B. In Any Event, Plaintiffs' Claims Are Deficient And Should Be Dismissed With**  
6 **Prejudice.**

7 **1. The Court Should Grant A Motion To Dismiss Where The Claims Alleged Are**  
8 **Legally Flawed Or Factually Unsupported.**

9 Even were it not for the fact that the present Complaint is barred, the Court should dismiss  
10 Plaintiffs' claims with prejudice because they are deficient under Federal Rule of Civil Procedure  
11 12(b)(6) and Federal Rule of Bankruptcy Procedure 7012). Dismissal can be based on either the  
12 lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal  
13 theory. *Balistreri v. Pacific Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1988); *Robertson v. Dean*  
14 *Witter Reynolds, Inc.*, 749 F.2d 530, 533-34 (9th Cir. 1984).

15 For the purposes of a 12(b)(6) motion, the allegations of fact in the complaint are accepted as  
16 true and construed in the light most favorable to the plaintiff. *Warren v. Fox Family Worldwide,*  
17 *Inc.*, 328 F.3d 1136, 1139 (9th Cir. 2003), *cert. denied*, 543 U.S. 1050 (2005). However, in ruling  
18 on a Rule 12(b)(6) motion, the court need not accept as true conclusory allegations or legal  
19 characterizations cast in the form of factual allegations. *Id.*; *Ileto v. Glock Inc.*, 349 F.3d 1191, 1200  
20 (9th Cir. 2003). Nor must the court "swallow the plaintiff's invective hook, line, and sinker."  
21 *Yeager v. City of San Diego*, No. 05CV2089-BEN (WMC), 2007 WL 7032933, \*3 (S.D. Cal. Jun. 1,  
22 2007). Rather, "bald assertions, unsupportable conclusions, periphrastic circumlocutions, and the  
23 like need not be credited." *Id.*

24 Recently, the Supreme Court in *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009), confirmed  
25 the requirement that pleadings must contain more than labels and unsupported conclusions. Noting  
26 that "to survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as  
27 true, to 'state a claim to relief that is plausible on its face,'" the Court emphasized that conclusory  
28 allegations are not entitled to be assumed true. *Id.* at 1949-1952 (quoting *Bell Atlantic Corp. v.*

1 *Twombly*, 550 U.S. 544, 570 (2007)). And, in meeting its obligation to plead sufficient factual  
2 matter, a plaintiff remains subject to his Rule 11 obligation to do so in good faith. *See generally*,  
3 *Garza v. American Home Mortg.*, No. CV F 08-1477 LJO GSA, 2009 WL 188604, \*5 (E.D. Cal.  
4 Jan. 26, 2009) (admonishing plaintiff that any amended complaint must be pled “subject to F. R.  
5 Civ. P. 11(b) requirements that [plaintiff] has the ability to tender and pay back what she received”).

6 **2. Plaintiffs’ Second Claim For Violation Of The Truth In Lending Act (“TILA”)**  
7 **Fails.**

8 **a. Plaintiffs’ TILA Rescission Claim Is Time-Barred.**

9 The right to rescission under TILA expires within three years. 15 U.S.C. § 1635(f) (stating  
10 that “[a]n obligor's right of rescission shall expire three years after the date of consummation of the  
11 transaction or upon the sale of the property, whichever occurs first”); *see* 12 C.F.R. 226.2(13)  
12 (stating that transaction is consummated at the moment “a consumer becomes contractually  
13 obligated on a credit transaction”); *e.g.*, *Andrade v. Wachovia Mortg., FSB*, No. 09 CV 0377 JM  
14 (WMc), 2009 WL 1111182, \*6 (S.D. Cal. Apr. 21, 2009) (dismissing plaintiff’s TILA claim for  
15 rescission as time-barred because it had been over three years since plaintiff entered into the subject  
16 loan).

17 Here, Plaintiffs allege that they entered into the Loan in February 2007. Compl., ¶ 27.  
18 However, Plaintiffs did not file the present Complaint until May 2010, or more than three years later.  
19 Plaintiffs’ TILA claim for rescission is clearly time-barred and must be dismissed with prejudice.

20 **b. Plaintiffs Do Not Allege A Proper Notice Of Rescission Or The Ability To**  
21 **Tender The Loan Proceeds.**

22 Moreover, Plaintiffs’ claim for rescission under TILA fails because Plaintiffs do not plead  
23 the requisite factual basis for such a claim. *See* 15 United States Code Section 1601, *et seq.*; *e.g.*,  
24 *Labes v. Ocwen Loan Servicing, LLC*, No. CV F 09-1172, 2009 WL 3748291, \*1 (E.D. Cal. Nov. 5,  
25 2009) (stating that Regulation Z is implementing regulation for TILA). In order to obtain rescission  
26 under TILA, a plaintiff must notify the lender of his or her intention to rescind, and provide the  
27 lender an opportunity to respond to that demand. In particular, TILA states that:

28 The obligor shall have the right to rescind the transaction until

1 midnight of the third business day following the consummation of  
2 the transaction or the delivery of the information and rescission  
3 forms required under this section ... whichever is later, by  
4 notifying the creditor, in accordance with the regulations by the  
5 board, of his intention to do so.... Within 20 days after receipt of a  
6 notice of rescission, the creditor shall return to obligor any money  
7 or down payment or otherwise, and shall take any action necessary  
8 or appropriate to reflect the termination of any security interest  
9 created under the transaction.

10 15 U.S.C. §§ 1635(a)-(b); 12 C.F.R. 226.23(a)(2) (providing that in order “[t]o exercise the right to  
11 rescind [under TILA], the consumer shall notify the creditor of the rescission by mail, telegram or  
12 other means of written communication”). As part of the notice, plaintiff must allege his or her  
13 ability to tender, or return, the proceeds of the loan. *See Valdez v. America’s Wholesale Lender*, No.  
14 C 09-02778 JF (RS), 2009 WL 5114305, \*5 (N.D. Cal. Dec. 18, 2009) (dismissing plaintiffs’ claim  
15 for rescission under TILA because they had not alleged that they were willing and able to repay the  
16 principal of their loan); *Carnero v. Weaver*, No. C 09-1995 JF (RS), 2009 WL 2180372, \*2 (N.D.  
17 Cal. Jul. 22, 2009) (same); *Carlos v. Ocwen Loan Servicing, LLC*, No. CV F 09-0260 LJO GSA,  
18 2009 WL 1295873, \*4 (E.D. Cal. May 8, 2009) (same); *Pagtalunan v. Reunion Mortgage Inc.*, C 09-  
19 00162 EDL, 2009 WL 961995, at \*3 (N.D. Cal. Apr. 8, 2009) (same); *Guerrero v. Citi Residential*  
20 *Lending, Inc.*, No. CV F 08-1878 LJO GSA, 2009 WL 926973, \*6-8 (E.D. Cal. Apr. 3, 2009)  
21 (same); *Garza v. American Home Mortg.*, No. CV F 08-1477 LJO GSA, 2009 WL 188604, \*4 (E.D.  
22 Cal. Jan. 26, 2009) (same).

23 In rejecting plaintiff’s TILA rescission claim at the pleading stage because the plaintiff failed  
24 to affirmatively allege his ability and willingness to tender or return the loan proceeds as part of the  
25 process, the *Guerrero* court acknowledged a line of Ninth Circuit authority standing for the  
26 proposition that courts should reject rescission claims where the plaintiff cannot tender. 2009 WL  
27 926973, at \*7 (citing several Ninth and Fourth Circuit decisions for the proposition that a borrower  
28 should not be permitted to rescind his or her mortgage loan absent evidence of his ability to tender  
the proceeds). In reaching its conclusion, the court noted that despite the step-by-step rescission  
procedure set forth in the statute, it was unwilling to permit plaintiff to proceed unless he could  
tender because, “[c]learly it was not the intent of Congress to reduce the mortgage company to an



1 unsecured creditor or to simply permit the debtor to indefinitely extend the loan without interest.”  
2 *Id.* at \* 8. Moreover, the *Guerrero* court questioned whether the plaintiff could meet this pleading  
3 requirement where he had already acknowledged in his pleading that he was in default under his  
4 mortgage loan. *Id.*

5 Here, Plaintiffs do not allege that they have properly complied with the notice requirement.  
6 See Compl., ¶ 32 (“On October 30, 2007, and again on January 14, 2008 the Galindos gave notice,  
7 through their attorney, of their election to rescind the transaction by reason of violations of federal  
8 Truth in lending statutes”) (emph. added). Specifically, Plaintiffs do not allege that they gave  
9 MortgageIT any notice of their claim for rescission.

10 Additionally, Plaintiffs do not allege that they are able to tender or return the loan proceeds.  
11 Compl., ¶ 53 (“Plaintiffs are informed and believe that they will be capable of tendering to  
12 Defendant the proceeds received by them in the rescinded transaction, whether in a lump sum,  
13 payments over time, refinance, sale of the property, or the surrender of the property itself) (emph.  
14 added). Indeed, they filed for a voluntary Chapter 13 bankruptcy petition based on their failure to  
15 meet their mortgage payments.

16 As such, Plaintiffs’ Complaint does not set forth facts sufficient to state a claim for rescission  
17 under TILA. The Court should therefore dismiss Plaintiffs’ TILA claim for rescission with  
18 prejudice.

19 **3. Plaintiffs’ Third Claim For Fraud Fails.**

20 **a. Plaintiffs’ Fraud Claim Is Time-Barred.**

21 Fraud claims are subject to a three-year statute of limitation. Cal. Civ. Pro. Code § 338(d).  
22 Here, Plaintiffs allege that they entered into the Loan in February 2007. Compl., ¶ 27. However,  
23 Plaintiffs did not file the present Complaint until May 2010, or more than three years later.  
24 Plaintiffs’ fraud claim is therefore time-barred and must be dismissed with prejudice.

25 **b. Plaintiffs’ Fraud Claim Is Lacking In Factual Support And Is Not Pled**  
26 **With Sufficient Particularity.**

27 Fraud claims in an adversary proceeding must meet the heightened pleading standard of Rule  
28 9(b) of the Federal Rules of Civil Procedure, which requires allegations of “particular facts going to

the circumstances of the fraud, including time, place, persons, statements made and an explanation of how or why such statements are false or misleading.” Fed. Bankr. R. 7009 (stating that Fed. R. Civ. P. 9(b) applies in adversary proceedings). Rule 9(b) requires particular averments regarding each defendant’s participation in the allegedly fraudulent scheme. *See, e.g., Semegen v. Weidner*, 780 F.2d 727, 731 (9th Cir. 1981) (affirming dismissal of fraud claim because “[p]laintiffs have done nothing more than set forth conclusory allegations of fraud....”). Where a plaintiff alleges that several defendants participated in a fraudulent scheme, Rule 9(b) requires plaintiff to “differentiate their allegations” and “inform each defendant separately of the allegations surrounding his alleged participation in the fraud.” *Swartz v. KPMG LLP*, 476 F.3d 756, 764-65 (9th Cir. 2007). At a minimum, a plaintiff must “identif[y] the role of [each] defendant[ ] in the alleged fraudulent scheme.” *Id.* at 765 (citing *Moore v. Kayport Package Express, Inc.*, 885 F.2d 531, 541 (9th Cir. 1989)).

Rule 9(b) applies to statutory claims based on misrepresentations even if the statute eliminates some traditional elements of fraud, such as reliance. *See Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1103-04 (9th Cir. 2003) (stating that Rule 9(b)’s particularity requirement applies to any averments of fraud even in claims for which fraud is not an essential element). Where a plaintiff alleges a uniform course of fraudulent conduct and relies on that conduct as the basis of a claim, the claim “sounds in fraud” and the plaintiff must plead the whole claim with particularity. *Id.* at 1104. Further, a plaintiff who makes allegations upon information and belief must state a factual basis for his belief, even when the allegations concern matters said to be peculiarly within defendant’s knowledge. *Neubronner v. Milken*, 6 F.3d 666, 672 (9th Cir. 1993).

Plaintiffs’ fraud claim is woefully deficient as to MortgageIT when compared against this stringent standard. First, Plaintiffs do not allege that MortgageIT made any specific, factual misrepresentations. In fact, the only reference to MortgageIT is the allegation that MortgageIT somehow “knew [the misrepresentations] were false when made.” Compl., ¶ 58. However, this allegation does not involve any alleged communication between MortgageIT and the Plaintiffs, let alone an alleged misrepresentation.

Second, to the extent the Court looks at the factual allegations throughout the Complaint, it is



1 clear that the only alleged misrepresentations made to Plaintiffs involve statements made by  
2 defendants other than MortgageIT. *E.g.*, Compl., ¶ 19 (“Prior to February, 2007, the debtors were  
3 solicited by phone by Gloria Gardner to refinance their home.... All conversations with Gardner  
4 were in Spanish”); Compl., ¶ 21 (“Gardner represented to the Galindos that the loan she proposed for  
5 them would have lower payments than their present loan....”); Compl., ¶ 23 (“Gardner completed a  
6 loan application form in English.... [t]hat application falsely stated that Mr. Galindo operated a  
7 bookkeeping service....”); Compl., ¶ 24 (“Gardner misrepresented the terms of the new loan....”);  
8 Compl., ¶ 28 (“The prepayment penalty to American Home Mortgage on the existing mortgage was  
9 ... greater than Garnder’s representations”) (emphs. added). As noted, Plaintiffs do not make any  
10 allegations that they communicated with anyone at MortgageIT or that MortgageIT made any  
11 misstatements to them.

12 Plaintiffs cannot rely on such generalized allegations against other defendants to support a  
13 viable claim for fraud against MortgageIT. For all of these reasons, Plaintiffs’ fraud claim falls well  
14 short of the pleading requirements set forth in Rule 9(b) and the Court should dismiss Plaintiffs’  
15 claim as to MortgageIT with prejudice.

16 **4. Plaintiffs’ Fourth Claim For Rescission Under California Civil Code Section**  
17 **1632 Fails As To MortgageIT.**

18 **a. The Provisions Of Section 1632 Do Not Apply To The Loan.**

19 California Civil Code Section 1632 provides in pertinent part that,

20 Any person engaged in a trade or business who negotiates primarily in  
21 Spanish, Chinese, Tagalog, Vietnamese, or Korean, orally or in  
22 writing, in the course of entering into any of the following, shall  
23 deliver to the other party to the contract or agreement and prior to the  
execution thereof, a translation of the contract of agreement in the  
language in which the contract or agreement was negotiated ....

24 Cal. Civ. Code § 1632(b) (emph. added). On its face, California Civil Code Section 1632 does not  
25 apply to home mortgage loans. *See* Cal. Civ. Code § 1632(b)(2) (stating that statute applies to a  
26 “loan or extension of credit secured other than by real property ....”) (emph. added). The statute  
27 provides a handful of exceptions, however, when the statute will apply to home loans. These  
28 exceptions include reverse mortgages and loans “for use primarily for personal, family or household

purposes” that are subject to the provisions of California Business and Professions Code Section 10240, the Industrial Loan Law (codified at California Financial Code Section 18000, *et seq.*) or the California Finance Lenders Law (codified at California Civil Code Section 22000, *et seq.*) See Cal. Civ. Code § 1632(b)(4) and (5). The Court must dismiss any claim for violation of California Civil Code Section 1632 if the transaction at issue is not governed by the statute. See *Tina v. Countrywide Home Loans, Inc.*, No. 08 CV 1233 JM (NLS), 2008 WL 4790906, \*7 (S.D. Cal. Oct. 30, 2008) (dismissing plaintiffs’ claim under Section 1632 because it is not covered by the statute’s provisions).

Here, the subject loan on its face is not covered by Section 1632 because it is a mortgage loan secured by an interest in real property. See Compl., ¶¶ 19, 27. Further, none of the statutory exceptions apply to the Loan.

First, the Loan is not a reverse mortgage. See Cal. Civ. Code § 1923 (listing requirements for reverse money mortgage, including no payment of principal or interest until full loan amount is due); c.f. Compl., ¶ 27, Exh. A, ¶ F (providing that Plaintiffs are to make regular payments until debt is fully satisfied). Neither do Plaintiffs allege that the Loan falls under any of the other exceptions in California Civil Code Section 1632(b)(4). MortgageIT is not alleged to be governed by the Industrial Loan Law. See Cal. Fin. Code § 18003 (stating that statutory scheme applies to premium financing companies); Cal. Fin. Code §§ 18560-18563 (defining premium financing companies as those that engage in lending to insurers). Nor is MortgageIT alleged to be a lender governed by the California Finance Lenders Law. See Cal. Fin. Code § 22209 (defining finance lender as one who engage in consumer or commercial loans for personal property) (emph. added).

Second, Plaintiffs’ claim also fails because there are no facts to implicate California Business and Professions Code Section 10240. Specifically, that statute governs the conduct of real estate brokers, and defines a “real estate broker” as one who “solicits borrowers, or causes borrowers to be solicited, through express or implied representations that the broker will act as an agent in arranging a loan, but in fact makes the loan to the borrower from funds belonging to the broker.” Cal. Bus. & Prof. Code § 10240(b). However, Plaintiffs do not allege that MortgageIT is a real estate broker. See Compl., ¶¶ 27, 63 (alleging that MortgageIT is lender). Rather, Plaintiffs assert that Hilltop

Financial Mortgage, and specifically its employee Gloria Gardner, was their mortgage broker for the Loan. Compl., ¶¶ 9, 19, 21, 23, 24. Therefore, this provision does not apply to MortgageIT. *See Delino v. Platinum Community Bank*, 628 F. Supp. 2d 1226, 1234 (S.D. Cal. 2009) (dismissing Section 1632 claim because plaintiff does not allege defendants were “a real estate broker and thus subject to the requirement to provide a translation”); *Ibarra v. Plaza Home Mortg.*, No. 08-CV-01707-H (JMA), 2009 WL 2901637, \*5 (S.D. Cal. Sept. 4, 2009) (same).<sup>1</sup>

**b. Plaintiffs Cannot State A Claim For Rescission Under Section 1632.**

Section 1632 provides that “[u]pon a failure to comply with the provisions of this section, the person aggrieved may rescind the contract or agreement ....” Cal. Civ. Code § 1632(k) (emph. added). However, in order to obtain rescission under the statute, Plaintiffs must tender, or offer to tender, the proceeds from the subject loan. Cal. Civ. Code § 1691 (providing that in order to rescind, the borrower must give notice of rescission and restore everything of value received under the contract); *e.g.*, *Delino*, 628 F. Supp. 2d at 1234 (dismissing plaintiff’s Section 1632 claim on separate grounds, and noting also that plaintiff “has not alleged that she has or can tender funds sufficient to effectuate a rescission of the loan, as required by § 1632(k)”); *Ritchie v. Community Lending Corp.*, No. CV 09-02484 DDP (JWJx), 2009 WL 2581414, \*3 (C.D. Cal. Aug. 12, 2009) (dismissing plaintiff’s Section 1632 claim because “Plaintiff has not alleged that she offered to restore everything of value received under the Subject Loan, and likewise has not made allegations that would allow the Court to infer that she had the means to do so”); *Rodriguez v. Litton Loan Servicing*, No. 2:09-cv-00029-MCE-DAD, 2009 WL 1326339, \*3 (E.D. Cal. May 11, 2009) (refusing to permit plaintiff to seek rescission because “Plaintiff failed to allege he is ready or able to tender the loan proceeds to Defendants, a failure that is fatal to his instant claim.”); *Hafiz v. Greenpoint Mortg. Funding, Inc.*, No. C 09-01729 WHA, 2009 WL 2137393, \*7-8 (N.D. Cal. Jul. 16, 2009) (stating that “[i]n accordance with California law, an order of rescission would require

<sup>1</sup> Plaintiffs’ conclusory allegations of agency are insufficient to bring MortgageIT under this exception. Compl., ¶ 63 (alleging that “Hilltop was acting as MortgageIt’s agent”); *e.g.*, *Ibarra v. Plaza Home Mortg.*, No. 08-CV-01707-H (JMA), 2009 WL 2901637, \*5 (S.D. Cal. Sept. 4, 2009) (noting that “Plaintiff’s legally conclusory allegation that each Defendant is responsible for the acts of other Defendants based on the doctrine of respondeat superior is insufficient to state a claim against FDIC-Receiver for a violation of § 1632”).

1 [plaintiff] to tender the property that she received pursuant to the lease agreement” but she has failed  
2 to do so).

3 Here, Plaintiffs do not allege that they have tendered the proceeds required for rescission, or  
4 have the ability to do so. *See* Compl., ¶¶ 53, 54 (alleging that “Plaintiffs are informed and believe  
5 that they will be capable of tendering to Defendant the proceeds received by them.... whether in a  
6 lump sum, payments over time, refinance, sale of the property, or the surrender of the property  
7 itself”). Indeed, Plaintiffs filed for voluntary bankruptcy based upon their inability to meet the  
8 payment obligations under the Loan.

9 **c. Plaintiff’s Claim Under Section 1632 Is Time-Barred.**

10 In any case, Plaintiffs’ claim is barred by the applicable one-year statute of limitation. Cal.  
11 Civ. Code §340(a) (providing that one-year statute of limitation applies to any claim based in  
12 “statute for a penalty or forfeiture”); *see Delino*, 628 F. Supp. 2d at 1234 (dismissing claim on other  
13 grounds but noting that plaintiffs’ claim may be time-barred California Civil Code Section 340(a));  
14 *Castaneda v. Saxon Mortg. Servs.*, No. Civ. 2:09-01124 WBS DAD, 2009 WL 4640673, \*7 (E.D.  
15 Cal. Dec. 3, 2009) (same). Here, Plaintiffs allege that they entered into the Loan on February 15,  
16 2007 (Compl., ¶ 27), however, did not file this Complaint until May 2010.

17 For all of these reasons, Plaintiffs’ fourth cause of action for rescission under California Civil  
18 Code Section 1632 fails and the Court must dismiss it with prejudice.

19 **5. Plaintiffs’ Fifth Claim For Determination Of Extent And Validity Of Lien Fails**  
20 **Because Plaintiff’s Own Allegations Indicate That MortgageIT Is Not The**  
21 **Current Holder Of The Loan.**

22 Plaintiffs ask the Court to determine “whether the lien of MortgageIT and MERS” is a valid  
23 encumbrance on the property.” Compl., ¶ 68. However, Plaintiffs acknowledge in their Complaint  
24 that the “rights in the Loan have been transferred to Washington Mutual Bank. Washington Mutual  
25 has in turn been closed and its assets sold to J.P. Morgan Chase.” Compl., ¶ 30. Indeed, there is no  
26 allegation that MortgageIT is asserting any current interest in the Loan. *See* Compl., ¶ 33 (“WaMu  
27 filed a proof of claim in these proceedings for the mortgage arrears in the amount of \$539,080)  
28 (emph. added). Accordingly, there is no basis for this relief from MortgageIT. *See In re Thomas*,

102 B.R. 199, 201 (E.D. Cal. 1989) (“The California courts have long recognized the maxim that a lien cannot survive ... absent the existence of an enforceable underlying obligation”).

Additionally, to the extent Plaintiffs’ claim is based on their other claims, it fails for the reasons set forth herein. *See, e.g.*, Section III.B.3, *supra*.

Accordingly, Plaintiffs’ claim for a determination of the extent and validity of the lien lacks basis as to MortgageIT and must be dismissed with prejudice.

**6. Plaintiffs’ Seventh Claim Under California Civil Code Section 3345 Fails Because There Is No Basis For Such A Claim As To MortgageIT.**

Plaintiffs seek treble damages pursuant to California Civil Code Section 3345 in conjunction with their Truth in Lending Act claim. *See* Compl., ¶¶ 75, 78. This Civil Code provision “provides for trebling punitive damages for unfair or deceptive practices against senior citizens or disabled persons.” *Sanchez v. Monumental Life Ins. Co.*, 102 F.3d 398, 405 (9th Cir. 1996). Specifically, Section 3345(b) states:

Whenever a trier of fact is authorized by a statute to impose either a fine, or a civil penalty or other penalty, or any other remedy the purpose or effect of which is to punish or deter, and the amount of the fine, penalty, or other remedy is subject to the trier of fact's discretion, the trier of fact shall consider all of the following factors, in addition to other appropriate factors, in determining the amount of fine, civil penalty or other penalty, or other remedy to impose. Whenever the trier of fact makes an affirmative finding in regard to one or more of the following factors, it may impose a fine, civil penalty or other penalty, or other remedy in an amount up to three times greater than authorized by the statute, or, where the statute does not authorize a specific amount, up to three times greater than the amount the trier of fact would impose in the absence of that affirmative finding ...

(emph. added). Significantly, the Ninth Circuit has held that “on its face, [Section 3345] allows for the trebling, in certain cases involving senior citizens and disabled individuals, of fines or penalties which are otherwise ‘authorized by a statute.’” (emph. added). *Sanchez*, 102 F.3d at 405; *see Griffin v. Felton (In re Felton)*, 197 B.R. 881, 892 (N.D. Cal. 1996) (stating as to Section 3345, that “once a determination has been made that punitive damages should be awarded, the statute acts only as a discretionary multiplier”) (emph. added); *Ross v. Pioneer Life Ins. Co.*, 545 F. Supp. 2d 1061, 1066 (C.D. Cal. 2008) (stating that “California Civil Code § 3345 permits the trebling of punitive damages

in appropriate cases”) (emph. omitted). Because this claim is simply a form of relief, and not an independent cause of action, it should be dismissed with prejudice.

In any event, Plaintiffs fail to allege a basis to treble punitive damages pursuant to Section 3455. First, Plaintiffs do not seek damages, let alone punitive damages, in connection with their TILA claim. *See* Compl., ¶¶ 42-56.

Second, punitive damages are not available under TILA. Damage remedies under TILA are limited in scope to actual and statutory damages. *See* 15 U.S.C. § 1640(a) (providing for actual and statutory damages under TILA); *In re Buckles*, 189 B.R. 752, 765 (Bankr. D. Minn. 1995) (describing the statutory damages available under TILA as a “punitive” remedy assessed in an amount equal to multiples of the charged finance charge). In keeping with this structure of the statute, punitive damages are not available under TILA. *See Pelayo v. Home Capital Funding*, Case No. 08-CV-2030 IEG (POR), 2009 WL 1459419, \* 9 (S.D. Cal. May 22, 2009) (granting defendant’s motion to strike punitive damages allegations because “Plaintiff may not recover punitive damages under her RESPA or TILA claims”); *In re Ameriquest Mortgage Co.*, No. 05-CV-7097, 2007 WL 1832113, \*2 (N.D. Ill. June 25, 2007) (stating that “TILA does not provide for recovery of punitive damages”); *Bond v. Fleet Bank (RI), N.A.*, No. 01-1778 L, 2002 WL 373475, \*3 (D. R.I. Feb. 21, 2002) (same).<sup>2</sup>

Accordingly, Plaintiffs have no basis for a claim under Section 3345 as to MortgageIT and it must be dismissed with prejudice.<sup>3</sup>

<sup>2</sup> Additionally, any claim for damages under TILA is time-barred. In order to maintain an action for actual or statutory damages under TILA, a plaintiff must bring his action “within one year from the date of the occurrence of the violation.” 15 U.S.C. § 1640(e); *see Smith v. Gold Country Lenders (In re Smith)*, 289 F.3d 1155, 1157 (9th Cir. 2002) (defining actual damages under TILA as those which “compensate for a proven injury or loss”) (emph. and citation omitted)). The “occurrence” of the violation, for purposes of applying this statute of limitation, is measured from the “date of consummation” of the transaction, which is generally the date on which the money is loaned to the debtor.” *Rowland v. Novus Fin. Corp.*, 949 F. Supp. 1447, 1454 (D. Haw. 1996) (citing *King v. State of Cal.*, 784 F.2d 910, 913 (9th Cir. 1986)); *see* 12 C.F.R. 226.2(13) (stating that transaction is consummated at the moment “a consumer becomes contractually obligated on a credit transaction”); *Meyer v. Ameriquest Mortgage Co.*, 342 F.3d 899, 902 (9th Cir. 2003) (affirming summary judgment in favor of defendant because plaintiffs did not bring TILA claim for damages until more than one year after loan closing documents were signed); *Monaco v. Bear Stearns Residential Mortgage Corp.*, 554 F.Supp.2d 1034 (C.D. Cal. 2008) (dismissing plaintiff’s TILA claim for damages because it was brought more than one year after “consummation” of the loan).

<sup>3</sup> California Civil Code Section 1632, the only other statutory violation alleged against MortgageIT, cannot  
Continued on following page



1 IV CONCLUSION

2 Plaintiffs appear to have filed this duplicative adversary proceeding to avoid the fact that  
3 their claims were already dismissed by the Court in a previous action. However, Plaintiffs' claims  
4 cannot proceed because they are barred by the *res judicata* doctrine.

5 In any event, Plaintiffs' claims are deficient for the same reasons they were the last time  
6 around. Now, over three years after obtaining the loan from MortgageIT, Plaintiffs claim that they  
7 were not provided proper disclosures. However, Plaintiffs fail to allege any specific facts to show  
8 that MortgageIT acted improperly in connection with this loan transaction.

9 Accordingly, MortgageIT respectfully requests that the Court dismiss Plaintiffs' claims in  
10 their entirety with prejudice as to MortgageIT.

11 DATED: June 11, 2010.

REED SMITH LLP

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13  
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26 Continued from previous page

27 serve as the basis for punitive damages. Compl., ¶¶ 61-65. Indeed, this statute provides only that "[u]pon a  
28 failure to comply with the provisions of this section, the person aggrieved may rescind the contract or  
agreement ...." Cal. Civ. Code § 1632(k) (emph. added). The statute does not provide for recovery of  
damages of any type, let alone punitive damages.